United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-1237

To be argued by
IRVING ANOLIK

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH FALCONE and
JOSEPH CURRERI,

Appellants.

ON APPEAL FROM JUDGMENTS AND COMMITMENTS OF THE
UNITED STATES DISTRICT COURT FOR DISTRICT OF VERMONT

DEFENDANTS-APPELLANTS' JOINT BRIEF

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Docket No. 76-1237

UNITED STATES OF AMERICA,

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JOSEPH FALCONE and
JOSEPH CURRERI,

Defendants-Appellants.

DEFENDANTS-APPELLANTS' JOINT BRIEF

STATEMENT

Defendants-appellants, jointly and severally, appeal from judgments of the United States District Court for the District of Vermont, rendered the 19th day of April, 1976, convicting them of five counts of violating Title 18 United States Code Section 152, including one count of conspiracy to do so in violation of 18 U.S.C. Section 371, after trial before Honorable Albert W. Coffrin, District Judge, and a Jury. Appellant FALCONE was sentenced to 3 years imprisonment plus a $2,000 fine on each of five counts, making a total fine of $10,000; the sentences otherwise ran concurrently. Appellant CURRERI was sentenced to 3 years imprisonment plus a $500 fine on each of five counts, for a total of $2,500; otherwise the sentences ran concurrently. Both appellants, first offenders, are presently on bail pending appeal.

INTRODUCTORY

This case is most unusual in that there is insufficient evidence as a matter of law to have warranted either the indictment or the conviction.

The record reveals that an F.B.I. agent who had some training in accountancy, but was not a certified public accountant, made serious errors in bis construction of certain books and records, as a result of which he convinced the United States Attorney that a crime had been committed under 18 U.S.C. §152, relating to concealment of assets in a bankruptcy proceeding.

We submit that a perusal of the record reveals that he was totally incorrect and that there was no concealment whatsoever. On the contrary, there was full disclosure made at all times.

The tragedy of this case is that the Court ever let it go to a jury.

It is submitted that if there was ever a case which came within the purview of UNITED STATES v. TAYLOR, (2 Cir. 1972), 464 F.2d 240, at 242, this is that case.

Additionally, the Court permitted evidence to be adduced as to alleged conspiratorial acts which occurred in 1971, concerning an involuntary bankruptcy petition which was filed on or about December 10, 1973.

The petition for involuntary bankruptcy was filed by a creditor after a fire destroyed the Alburg Creamery in Alburg, Vermont on July 13, 1973. It is noteworthy that the fire was not attributed in any way, shape or form to actions by the

defendants herein was, as a matter offact, that holocaust resulted in virtual economic ruin for both defendants. The Alburg Creamery was one of the major sources for cheese for Falcone Dairy Company in Brooklyn, New York, of which defendant FALCONE was Vice-President and defendant CURRERI was Office Manager.

Although not alleged in the indictment, the prosecution sought to prove, over objection, that the conspiracy started not on or about December 13, 1973, as alleged in Count One of the indictment, but actually in the early part of 1971.

It is incredible to believe that the prosecution, with a straight face, could allege that the defendants herein conspired to conceal assets with respect to an involuntary bankruptcy which would be filed on or about December 10, 1973, which was precipitated by a fire which destroyed Falcone Dairy's supplier of cheese, Alburg Creamery, on July 13, 1973. The defendants would have to have been capable of prognosticating the future.

The paradox and irony of this whole case is that the defendants made full and complete disclosure in all papers filed with the Trustee in Bankruptcy and the Bankruptcy Court. No assets whatsoever were concealed. Full explanations were given with respect to everything filed. The books and records of Falcone Dairy, upon which it is alleged the concealment took place, had full disclosure of all the items which the Government subsequently declared were efforts to conceal.

The crux of the whole case was a credit which Falcone Dairy took on the advice of counsel in 1974, of about $210,000,

against Alburg Creamery, the bankrupt, because of cheese which it had received in 1971 which had been defective. Since Alburg Creamery was a wholly-owned subsidiary of Falcone Dairy, Falcone explained that they did not take the credits in 1971 because that would have dried up the cash flow to Alburg Creamery and would have put it out of business at that time.

The books and records of Falcone Dairy, maintained by regular accounts payable and accounts receivable bookkeepers, who were in no way alleged to be co-conspirators, accurately reflected the fact that these credits had been given to customers for defective cheese in 1971.

When the involuntary petition in bankruptcy was filed in December of 1973, however, the office manager, defendant CURRERI, explained to the attorney for Falcone Dairy, Joseph Wool, Esq., of Burlington, Vermont, that these credits had been given to customers in 1971. Joseph Wool explained that it was perfectly proper to interpose this amount as a credit by Falcone Dairy against Alburg Creamery. This item was fully disclosed and was not kept secret.

Paradoxically, Falcone Dairy was virtually bankrupt itself at this time and the credit in no way affected the assets, one way or the other, which could be distributed among creditors. As a matter of fact, Falcone Dairy did not participate in any distribution of assets of Alburg Creamery.

Additionally, defendant FALCONE testified that he paid Bankers Trust Company $125,000 and mortgaged his own home in connection with this matter. He also was virtually bankrupt himself

as a result of what had occurred.

The Government called the cheese maker, J. Leo Laramee, who had worked for Alburg Creamery and Falcone Dairy in 1971 at Alburg, Vermont, and he claimed that he did not recall getting that many complaints about defective cheese.

We maintain that it was irrelevant as to whether or not he recalled any complaints. The fact remains that the credits were on the books and records of Falcone Dairy, all of which were made available to the Trustee in Bankruptcy. In addition, the credit of $210,000 was divulged to the Trustee in Bankruptcy. Finally, a full explanation was given as to why the credit was not taken in 1971, but instead was taken in 1974.

A Professor of Accountancy at the University of Vermont testified as an expert and explained fully why the F.B.I. agent, Albert O. Axton, was completely wrong in his assumption that the $210,000 credit was fraudulent.

We do not see how there can be a claim of concealment of assets when everything was disclosed.

The thrust of the Government's entire case really revolved around this $210,000 entry which was taken in 1974 by Falcone Dairy as a credit against Alburg Creamery, which was its wholly owned subsidiary. The credit was taken in 1974 pursuant to advice given to the defendants by Joseph Wool, Esq., their attorney, in connection with the Alburg bankruptcy proceeding.

The books and records of Falcone Dairy which were maintained in the regular course of business by bookkeepers, whose honesty was not challenged in any way, reflected that Falcone

Dairy gave substantial credits to customers for defective or returned cheese in 1971.

The credits were not charged back against Alburg Creamery in 1971, since to do that would in effect have stopped the cash flow to Alburg Creamery and in essence would have put it out of business.

Alburg Creamery was a wholly-owned subsidiary of Falcone Dairy and Falcone Dairy relied upon Alburg for a very substantial amount of its cheese production. When the fire destroyed Alburg Creamery on July 13, 1973 - a fire which in no way has been attributed to any act by the defendants - the catastrophe in essence put Falcone Dairy out of business as well.

The principals of Falcone Dairies had brought forth a plan whereby they could have paid back 100 cents on a dollar, if given an opportunity. There was also testimony that substantial investments in renovating the Alburg Creamery were under way before the fire.

Special Agent Axton, who was not a certified public accountant himself, reviewed the papers which were filed in the bankruptcy proceeding and noticed the $210,000 credit which Falcone Dairy had taken against Alburg Creamery. This was completely divulged in the papers. There is nothing in the record to show that the Trustee in Bankruptcy in any way questioned this entry.

Certainly the fact that the credit was taken was not concealed.

As a matter of fact, Falcone Dairy did not participat in the distribution of assets by Alburg Creamery, and Falcone

Dairy itself was insolvent at the time. The $210,000 entry really did not affect the asset picture of Alburg Creamery in any way so far as the distribution of assets was concerned. No creditor was defrauded as a result of this credit.

The examination and testimony of Special Agent Axton of the F.B.I. reveals that he was completely incorrect in his assumption that this $210,000 entry was improper or fraudulent.

Not only did Mario Accardi, a certified public accountant for almost four decades, testify that the entries were proper and were fully disclosed, but, in addition, Professor Gary Michaels of the University of Vermont, a Professor of Accountancy, testified that he had reviewed the books and records and the entries in dispute and found that nothing was improper and that there was no withholding of information but, on the contrary, there was complete disclosure of all essential matters. He explained why F.B.I. Agent Axton was incorrect.

The agent, that is Mr. Axton, also thought that he had found something fraudulent in a disclosed entry in the books of Falcone Dairy, whereby they evaluated the Alburg Creamery property, for the purpose of a possible loan, at over $300,000, which was greater than its acquisition price. The loan never went through.

Mr. Axton was of the opinion that Alburg Creamery property, therefore, should have continued to be valued at its market price as disclosed by the would-be loan agreement. What happened was that after the loan fell through, Alburg Creamery was listed as it always had been, at its acquisition price.

When Mr. Axton was questioned as to whether or not this was good accounting practice, he was so confused and so disorganized that it became obvious that he did not understand simple accounting procedures. Again we maintain that the testimony of Professor Michaels and certified public accountant Accardi clearly revealed that the Government and Axton were completely incorrect in viewing this entry as fraudulent.

As a matter of fact, this was not even part of the indictment, so that the Court merely indicated that it was something the jury could consider.

The entire thrust of the Government's case was that cheese which had been delivered from Alburg to Falcone Dairy in 1971 was not in fact bad. There was indisputable and uncontradicted evidence, however, that substantial credits were given to customers of Falcone Dairy in 1971 for cheese.

It was alleged under oath, not only by the bookkeepers, who were not involved in this case at all as possible defendants or co-conspirators, but also by the defendants themselves, that these credits were given because of problems with the cheese.

Irrespective of any other consideration, it is obvious that, in 1971, the actions in taking these credits on behalf of the customers could not be considered an act in contemplation of an involuntary bankruptcy petition which would be filed in December of 1973 as the result of a non-incendiary fire which occurred July 13, 1973, as a result of which Alburg and Falcone were thrown out of business.

The case herein is a distinct travesty of justice and

a great tragedy. The expense and trouble and disgrace that the defendants have been put through are revealed to have been completely needless in view of the fact that there was nothing left undisclosed; there was no concealment but, on the contrary, there was full and complete disclosure.

THE EVIDENCE AT TRIAL

The record was far longer than necessary. Basically, the entire question, as we have already pointed out in the Introductory, concerned certain accounting entries which were disputed by the Government. We maintain that there was no concealment whatsoever.

By stipulation certain records were admitted from the Bankruptcy Court through Judge Marro, the Bankruptcy Judge. (5-13)* (A-20-27)

Ronald Schmucker, an attorney, testified that he was the Trustee in Bankruptcy for the unsecured creditors. He stated that Alburg Creamery ceased doing business because of a fire on July 13, 1973. Alburg Creamery, of course, was the bankrupt. (42-43) (A-57, 58)

On December 13, 1973, an involuntary petition in bankruptcy was filed and amended about a month or so later. In February of 1974 Schmucker was appointed Trustee. (44, 45) (A-59, 60)

Schmucker testified that he received the books and records of the defendants from an attorney, Joseph Wool, of

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*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated; where prefix "A" is used, the reference is to the Appendix.

Burlington, Vermont.*

Schmucker further testified that Alburg Creamery owed Falcone Dairies $48,700. (48) (A-63)

Subsequently, a dividend of $172,000 was paid to the Trustee. (50) (A-65)

There were several other witnesses, including Ronald R. Plante, an accountant for P.F. Jurgs and Co., who stated that they had audited certain records. (54) (A-69)

Glenn Wright, an accountant, also worked for P.F. Jurgs and Co., and did certain auditing at Auburg Creamery. (65-66) (A-79-80)

Bertha Theoret testified that she had been employed by Falcone Dairies in Alburg, Vermont. J. Leo Laramee hired her as a bookkeeper. She stated that bills at first were paid out of New York and subsequently were paid out of Alburg after the Creamery itself was formed. (76, 77)

She stated that after the fire she ceased being employed. She testified that Falcone Dairies owed Alburg Creamery $160,000 as of June 30, 1973. (85)

She stated that she was not aware of any complaints about the cheese since she was only a bookkeeper. (87-90)

The main witness for the prosecution was J. Leo Laramee, who was a cheesemaker employed by Falcone Dairies and later was put in charge of Alburg Creamery production. (101-108)

He testified that he shipped primarily to Falcone Dairies and to Lucille Dairy in 1971. (110) There was no

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*It should be noted that at no time was there any allegation that books and records had been kept from the Trustee.

question but that Falcone Dairies was his main customer. He testified that Falcone was usually behind in payments, as a result of which Milton Cooperative, which was a cooperative of dairy farmers, sometimes stopped paying Alburg because they themselves did not pay on time. (116-119)

Laramee admitted that there had been a number of problems with cheese manufacturing, including a water problem in 1966 through 1969, when a well was built. This helped. He was unaware, however, of certain price freezes and other problems that beset the cheese industry in 1969 through 1973. (124-139)

He admitted that there were many things that could cause problems in cheese manufacture. (143-146)

The upshot of his testimony was that he claimed that he was unaware of major problems in 1971. (156-158) (A-99-101)

Laramee, however, admitted that Falcone Dairy was spending quite a bit of money remodeling Alburg Creamery prior to the fire. (159) (A-102)

He stated that when the fire occurred all of the records of Alburg Creamery were also burned. (164-167) (A-107-110)

Although he claimed that he had not been told of any large batches of rotten cheese in 1971, he admitted that 500 cases came back in 1973. He stated, however, that it was not abnormal to receive complaints about cheese. (167-170) (A-110-113)

Percy Sheltra stated that he was employed by Milton Cooperative from 1961 through 1974 as General Manager. He stated that there were serious problems with payments from Alburg Creamery.

Sheltra declared that there had been quite a depression in the cheese and milk business since in 1965 Milton Cooperative had 400 farmers, yet by 1973 they were down to 145 farmers. (198) (A-142)

There was a milk price freeze, he testified, sometime between 1969 and 1973, and of course this affected the ability to charge prices to make sufficient profit. (199-201) (A-143-145)

He stated that his dealings with Falcone and Alburg were good and he believed them to be a reliable company. (200-202) (A-144-146)

He stated that the average shipment of cheese was 40,000 pounds per truck. (197) (A-141)

Robert Brunelle, Sr., of Chittenden Trust Company in Vermont, stated that they were secured creditors of Alburg Creamery and that the bank lost no money since they were completely secured.

Thelma Lustig, a bookkeeper employed at Falcone Dairy from 1965 on, testified that defendant Curreri was the Office Manager of Falcone Dairy and that defendant Falcone was the Vice-President. (244-252)

She stated that it was not at all unusual for a jobber to take cheese and return it and thereby get a credit for whatever they returned. (252)

She stated that she worked under Mr. Curreri, who was Office Manager, she being a bookkeeper. She recalled that there was plenty of "screeching about cheese" in 1971. (254-256)

Mario Accardi testified that he was a certified public

accountant and had been such since 1942. He worked as the accountant for Falcone Dairies for 21 years, until May of 1974. (273, 274)

He was questioned about an entry on January 31, 1974, concerning a $210,000 some odd dollar credit adjustment for defective cheese by Falcone Dairy against Alburg Creamery for the period July 1971 through December 1971, upon a list retained by management. (283) (A-157)

It is very important to note that Mr. Accardi observed that this entire amount represented only about 5% of Falcone Dairy cheese sales for that period of time. (284) (A-158)

Mr. Accardi explained that the credits to customers in July through December of 1971 were for defective or otherwise unusable cheese. (287, 289) (A-161, 163)

He also explained that Falcone Dairies owned 100% of Alburg Creamery and therefore there was no purpose whatsoever in taking the credit in 1971. He explained that actually since they owned 100% of Alburg Creamery, it was like taking the money from one pocket and putting it in the other pocket. Additionally, the credit would have dried up the cash flow to Alburg Creamery.

Mr. Accardi also explained that an entry for $310,000 for unrealized appreciation on the Alburg Creamery property in connection with a loan that was being negotiated, was not an unusual or improper entry since that was a meaningful figure only in the event that the Creamery could be sold. As it turned out, the loan never went through and, consequently, the unrealized

appreciation could not be put on the books as an asset. Apparently the United States Attorney was having difficulty in understanding this concept. (310-321) (A-183-194)

He stated that he testified before the grand jury and had written to the United States Attorney (Exhibit 71), offering to explain the facts concerning the $210,000 entry. He was never given an opportunity to do this. (315-321) (A-188-194)

At page 330 of the record (A-173) Accardi explained why it would have been foolish and poor business to have taken the credit in 1971:

"Q In the event a credit such as this had been taken in 1971, what would that have done to the cash flow of Alburg Creamery?

A. Well, Alburg Creamery would have less assets, and it would weaken their position, actually.

Q And, it might have put them out of business, isn't that true?

A. Oh, yes.

Q Now, as a matter of fact, Falcone depended, from your knowledge of the business, upon Alburg Creamery to a great extent for its supplies, isn't that true?

A. Right. They were the major source of supply.

Q And, actually, Alburg Creamery was owned by Falcone Dairy, isn't that true?

A. That is right.

Q So when this credit was taken in 1974, did you find it necessary at all to amend the tax returns of Falcone Dairy?

A. No.

Q Would you explain to the jury why you didn't find it necessary?

A. Because for the fiscal years ended May 31,

1972 and May 31, 1973, Falcone Dairy incurred operating losses of $322,000, and if they had $210,000 credit, that would reduce the loss from 322,000 to $112,000."

He also explained that since Falcone Dairy had operating losses in 1972 and 1973, there was no necessity for amending any tax return in 1974 because it merely would have reduced the losses and not showed any income. (330, 331) (A-203-204)

Mr. Accardi further revealed that Falcone Dairies did not participate as a creditor in the bankruptcy. (331) (A-204)

It was his opinion that Falcone and Curreri did nothing improper. (332, 333) (A-205, 206)

As a matter of fact, he explained that Falcone Dairies kept putting fresh money into Alburg Cream ry to keep it going. (332, 333) (A-205, 206)

The accountant, Accardi, moreover, revealed that the credit of $210,000 had no effect on the Alburg land. It did not affect secured creditors and since Falcone Dairies itself was insolvent, and did not participate in the bankruptcy distribution, no other creditors were affected by it either. (337, 340) (A-210, 213)

He also pointed out that the defendants got advice of counsel before taking the credit. (340) (A-213)

He explained that with respect to the loan negotiations, when the loan fell through, the temporary entries were cancelled out. Mr. Accardi also pointed out that the girls in the Falcone Dairy office kept the books, and not Mr. Curreri and not Mr. Falcone. (363) (A-236)

Joseph S. Wool, an attorney at law practicing in Burlington, Vermont, stated that he had a concersation with the

defendants about cheese and was told that in 1971 there had been a large amount of credits given to customers because of bad or foul cheese which had been received from the Alburg Creamery in that year by Falcone Dairies. Mr. Wool declared that he gave a legal opinion that under the circumstances, since they had not previously taken the credit for this cheese, they could do so in 1974. (380-387) (A-253-260)

Moreover, he testified that had the creditors been a little bit more cooperative and not filed an involuntary petition in bankruptcy against Falcone Dairy, a procedure was being worked out whereby the creditors would have been paid one hundred cents on the dollar since his client was desirous of rebuilding. (386-396) (A-259-269)

It should be noted that Mr. Wool declared that he would never again trust a United States Attorney in that District and never have a conference with them again because they had deceived him when he spoke with Mr. Axton concerning this case. Mr. Wool had declared that it was his distinct understanding that nothing his client said would ever be used against him. (345) (A-218)

Gennaro Falivene testified that he was the brother of Philip Falivene. It was Philip who had testified extensively in the grand jury, and not Gennaro.*

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*We maintain that the calling of Gennaro Falivene was merely a ploy on the part of the prosecutor to avoid giving 3500 material to the defense. Later the defense had to call Philip Falivene on their own and, as it turned out, much of the testimony that he gave was unfavorable to the prosecution. It is also significant that Irene Fried, a bookkeeper who was brought up to Vermont at Government expense, was not called to testify either because she had helpful testimony to the defendant. (341-343) (A-214-216)

A letter of resignation from J. Leo Laramee was read (417), indicating that Laramee had resigned because he could not meet certain sanitary and other requirements at the Alburg Creamery.

James Kallstrom of the F.B.I. testified that he had had several conversations with defendant Falcone. In most of these conversations he did not inform Falcone that this was a criminal investigation. (417-423)

He stated that Falcone explained to him that the $210,000 entry about which he inquired was taken because of the fact that there had been defective cheese in 1971. Falcone stated that to have taken it in 1971 would have stopped the cash flow to Alburg Creamery and probably put it out of business. He further declared that his attorney, Mr. Wool, had told him he could take the deduction. (423-426)

Special Agent Playford testified in a similar vein.

F.B.I. Agent Albert Axton likewise testified as to conversations he had with Mr. Wool and Mr. Falcone. (448, 449)

He admitted that he had told Mr. Wool that he wanted to speak to him. When the meeting took place, he conceded that attorney Wool declared that he did not want Falcone interviewed at all. Nevertheless, he made mental notes of utterances Falcone gave to his attorney, and later on, at this trial, used them against him. (462-473) (A-287-298)

The testimony of Axton indicated that it was primarily upon his analysis of the books and records of this bankruptcy proceeding that the Government brought the indictment. The

witness clearly did not understand accounting principles.

Axton completely failed to understand the concept of unrealized appreciation (479, 480), and was completely confused when it became obvious that, contrary to the belief of the Government, there was full disclosure rather than non-disclosure.

Ironically, Axton declared that he had never seen the Falcone books with reference to the loan, although obviously they were available through the Trustee in Bankruptcy. (500) (A-325)

THE DEFENSE

Irene Fried testified for the defense that she worked as a bookkeeper for Falcone Dairy and remembered in 1971 that there was substantial bad cheese which she smelled and saw. She stated that she had never been asked to do anything improper. (554-558)

Reginald Abare, an attorney, stated that he was instructed to turn down defendant's offer of one hundred cents on the dollar because it was unsecured. (539)

Gary Keith Michael, testifying for the defense, stated that he was a Certified Public Accountant and an Associate Professor of Accountancy at the University of Vermont. He had reviewed all of the records appertaining to this case and stated that in his opinion there was nothing improper about the accounting methods used. Moreover, he declared that there was full disclosure made of everything. (568) (A-359)

Professor Michaels explained, among other things, the following (569, 570) (A-360-361):

"There were extensive notes explaining the transaction and on a typed financial statement, which included this transaction there were also extensive notes explaining it. As I see it, this was an entry that was made in regard to obtaining loans, and it was to increase the actual cost investment which was in the area of $58,000 up to an appraised value, a market value, of $360,000. It was put on the books at the time of the negotiation for the loan. At the time the loan did not come through, it was properly reversed. This type of entry, I have seen in a number of other situations where you attempt to move from cost to market. There is quite a problem in accounting today, with inflation, and the American Institute of Certified Public Accountants is now working on the problem, perhaps formulizing the moving up of cost values to replacement costs in today's dollars. It is called, price level accounting.

Q But the entries there were not improper entries, were they?

A. In my opinion, the entries are not improper since there is full disclosure, and it is possible to trace where the original cost is.

Q Was it not a fact that the base price was restored after the loan did not go through?

A. Yes. The entry increasing the investment, the asset account, and increasing the equity account, was reversed, so the fact, after the entry was put on the books, another entry was made to take it away, and we are back to the original cost.

Q Nothing improper about that?

A. In my opinion, no.

Q And, there was full disclosure, isn't that so?

A. Yes. There are a number of notes in here that explain that.

Q Now, for example, if a person was seeking a loan, let's say, from a bank and he had 100 shares of American Telephone stock which he had purchased at least say, for $10,000, but in the present market it was worth $20,000 market value, he would have a perfect right to tell the bank, 'Now look, it is true I only paid $10,000 for it,

but on today's market it is worth $20,000. Won't you lend us $15,000?' That would not be an unreasonable picture to paint, would it?

A. No; in fact, it is quite typical for bankers to ask what the market value of the collateral is.

Q If the loan doesn't go through, you would have to return to your base at the purchase price, which was $10,000?

A. Yes."

Philip Falivene was called by the defense and explained that it was he who testified extensively in the grand jury. He stated that he had been up at Alburg Creamery in 1971 for about eight months and was very dissatisfied with the way Laramee was handling the place. He claimed that the place was not sanitary and he was not satisfied with the way the plant was being run. (586-588) (A-377-379)

Joseph Campagna testified that he was in the cheese business and was a customer of Falcone Dairies. He had been subpoenaed by the Government, but the defense called him. He claimed that there had been a lot of problems with the cheese, that it was very smelly and foul, in 1971, and he had lost a lot of customers. He stated that he had to return a great deal of cheese. (605-612)

Defendant Joseph Falcone testified in his own behalf, stating that he was 51 years of age, married, and the father of four children, and had had a seventh grade education. He declared that he had been in the cheese business since he was about 14 or 15 years of age.

Falcone explained that Laramee was not very efficient and the reason Laramee was not making proper profit on the cheese

was that he was not getting proper production. (615-623)

Falcone stated that he himself was an expert cheesemaker and had been such for many years. He testified there were many, many things that could cause problems with cheese. (623-630)

He stated that when he spoke to the F.B.I. agents earlier, prior to trial, he was not aware of when the well had been dug at Alburg. He was absolutely certain, however, that he did have substantial problems with the cheese in 1971 and the returns were fully reported on the books of Falcone Dairy. The reason he did not take the credit until 1974 was that taking the credit in 1971 would have put the Alburg Creamery, which Falcone Dairy owned completely, in a very bad financial picture. On advice of counsel in 1974, since Alburg was bankrupt anyway, they did take the credit. Falcone Dairy, however, did not participate in the distribution of any bankrupt assets and, as a matter of fact, Falcone declared that he himself put in substantial money of his own and paid off a $125,000 loan to Bankers Trust, as well as taking a mortgage on his own house. (665-686; 707-718; 720-742) (A-413-433; A-455-466)

Joseph Curreri also testified in his own behalf, stating that he was 56 years of age, married, with four children, and had attended one year of college. He explained he was only an employee and had no voice in management. He, too, testified about the very foul cheese that was received in 1971, as a result of which credits had to be given. He also stated that there was not sufficient yield on the cheese which Laramee was manufacturing

at Alburg in 1971 (752-757) (A-476-481)

He was never told to do anything improper, and never did. (764) (A-488)

He, too, related the conversation with attorney Joseph Wool and also declared that there had been a plan to pay off one hundred cents on the dollar in connection with the bankruptcy of Alburg. (765-767) (A-489-491)

As Office Manager, he also testified that at the time the $210,000 credit was taken, it was really meaningless because Falcone Dairy was insolvent and Alburg Creamery, of course, was already out of business. (776-778) (A-500-502)

The $210,000 credit under no circumstances created any asset one way or the other. None of it was ever collectible. (780) (A-510)

The Government recalled Laramee, who testified that he still could not recall such substantial amounts of bad cheese.

THE STATUTE INVOLVED

§ 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney. or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property

or affairs of a bankrupt,

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

POINT I

THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO HAVE WARRANTED EITHER THE INDICTMENT OR A SUBMISSION OF THIS CASE TO THE JURY. THE COURT SHOULD HAVE DISMISSED THE CASE AT THE CLOSE OF THE PROSECUTION'S CASE UNDER THE PRINCIPLES OF UNITED STATES V. TAYLOR, 464 F.2d 240 (2 Cir. 1972).

The entire case herein was predicated upon a credit which Falcone Dairy Company asserted against its wholly-owned subsidiary, Alburg Creamery, the bankrupt, for about $210,000, in 1974. This credit was asserted, predicated upon advice of counsel and also upon the fact that in 1971, Falcone Dairy Company had given credits to its own cheese customers, of substantial amounts, for defective cheese.

Joseph Falcone, one of the defendants-appellants herein, was Vice-President of Falcone Dairy Company. Joseph Curreri, the other appellant, was the Office Manager, but held no title in the company.

Bookkeepers, whose honesty and integrity were not disputed, made entries in the regular course of business during 1971 indicating the credits for cheese. These books and records were turned over to the Trustee in Bankruptcy. All books and records of Falcone Dairy were made available to the Trustee in Bankruptcy. Nothing was deliberately or intentionally withheld.

The entry of $210,000 was fully disclosed to the Trustee in Bankruptcy.

An F.B.I. Agent by the name of Albert Axton, who was assigned to the District of Vermont, was obviously the "Godfather" of the prosecution herein. It was by virtue of his analysis of the books and records which were submitted in this case, that the prosecution determined to submit this matter to a grand jury. Axton testified at the trial as the key witness for the Government. He admitted that he was not a certified public accountant and that his training had been in the accounting field.

We have reproduced the testimony of Mr. Axton and ask this Court to review that in the light of the testimony of Mario Accardi, a certified public accountant of almost four decades experience, and that of Professor Gary Michaels, a certified public accountant who was a professor of accountancy at the University of Vermont.

It is pitifully manifest that Agent Axton did not know his accountancy and was obviously wrong in his analysis of the books and records.

Axton admitted that at most he saw a violation of accounting principles in taking a credit in 1974 for defective cheese which Falcone Dairy had received from Alburg Creamery in 1971. (477)

Axton admitted that he was not claiming that Falcone Dairy's books and records were false. (478)

When confronted with the fact that Mario Accardi, the accountant for Falcone Dairy with some 38 years experience as a

certified public accountant, had testified that he believed that the entry was proper, that is the credit for $210,000 in 1974, Axton declared that he disagreed with Mr. Accardi.

When Professor Michaels testified, he, too, testified that the entries were not improper and that there was no fraud or concealment but, on the contrary, there was full disclosure.

The testimony of Axton with respect to unrealized appreciation of the Alburg Creamery property in connection with a proposed loan that was being negotiated but which was never consummated prior to the bankruptcy, reveals how threadbare his knowledge of accountancy really was. He could not understand how it was possible that a piece of property which was acquired at an amount of "X dollars" many years ago could now be worth "X plus Y dollars" when a sale was contemplated. He had difficulty understanding the concept of unrealized appreciation. When asked various questions, it is obvious that Axton was completely "at sea" with respect to accounting principles that for a certified public accountant should have been "duck soup". (479) (A-304)

Alburg Creamery's books had been destroyed in a fire. Falcone Dairy's books were available and the red entries which were taken in 1971 for the defective cheese which was received from Alburg Creamery, were all in Falcone Dairy's books. (471) (A-296) Axton conceded this fact. There was no concealment of these red entries.

There is nothing in the record to indicate that the Trustee in Bankruptcy, or anyone else, challenged these entries.

As a matter of fact, since Falcone Dairy did not participate in the distribution since Alburg was its wholly-owned subsidiary, no creditor was in any way affected by the credit anyway.

Additionally, since Falcone Dairy had long since been insolvent itself, it was a meaningless entry since Falcone Dairy had no money of its own.

The Government permitted the entire trial to degenerate into an argument over whether or not smelly and defective cheese had in fact been delivered from Alburg Creamery to Falcone Dairy in 1971. There was obviously no dispute over the fact that the books and records which were kept in the regular course of business by bookkeepers in 1971 reflected many, many red entries indicating that cheese had been returned to Falcone Dairy from its customers. It is uncontested that in 1971 these credits were not charged against Alburg Creamery for the obvious reason that Alburg Creamery was a wholly-owned subsidiary of Falcone Dairy and to have charged these credits against Alburg in 1971 would have stopped its cash flow and, in effect, would have put it out of business. Falcone Dairy depended upon Alburg Creamery's production for the mainstay of its business.

The two defendants, the bookkeepers, a customer of Falcone Dairy, all testified that there was smelly, horribly odoriferous cheese received from the Alburg Creamery in 1971. Substantial amounts had been returned. J. Leo Laramee, who was the cheesemaker employed at Alburg Creamery, declared that he did not recall any great quantities of defective cheese being returned to him and did not recall that he had any great problems

with cheese in 1971. There were a great deal of discussions over whether or not a well had been dug in 1969 or 1971.

The net effect of all of this testimony was to introduce a great deal of irrelevant material into the case.

The issue in this case was whether a violation of Section 152 of Title 18 of the United States Code occurred, and whether a conspiracy to violate that Section had been perpetrated.

Title 18 United States Code -152 creates eight separate offenses in its eight paragraphs. (UNITED STATES v. GORDON, 379 F.2d 788, 2 Cir., cert. den. 389 U.S. 927 [1967]). See also, UNITED STATES v. ARGE, 418 F.2d 721, 723, 10 Cir. 1969.

Concealment is a continuing offense (SOMBERG v. UNITED STATES, 71 F.2d 637 [7 Cir. 1934]):

> "The concealor can be held but for one offense of concealing during the period of a continuous concealment." (Id. at 639).
>
> "It is sufficient to constitute concealment if it prevents the discovery of or withholds knowledge of the asset." BURCHINAL v. UNITED STATES, 342 F.2d 982, 985 (10 Cir.), cert. den. 382 U.S. 843 (1965).

See also, UNITED STATES v. ARGE, supra.

While we recognize that a finding of guilt must be sustained if it is supported by substantial evidence in the light most favorable to the United States (GLASSER v. UNITED STATES OF AMERICA, 315 U.S. 60, 1942), there is absolutely no basis upon which the Court could have predicated a submission of this case to the jury. (See UNITED STATES v. TAYLOR, supra).

The prosecution maintained that when the defendants

took the advice of their attorney, Joseph Wool, Esq., and had Falcone Dairy take a $210,000 credit for defective cheese which had been received by Falcone Dairy from Alburg Creamery in 1971, that this constituted the crime of concealment of assets.

There is absolutely nothing in the indictment to indicate that it was defective cheese which was the nub of the indictment.

The indictment says, inter alia, that the Falcone Dairy "with intent to defeat the bankruptcy law, did knowingly and fraudulently transfer and conceal property of Alburg Creamery; namely, accounts receivable to Alburg Creamery owed by Falcone Dairy, in excess of $100,000.00." [Count One].

The credit was fully disclosed to the Trustee in Bankruptcy and was never hidden.

During the trial, for the first time, the Government sought to establish that Alburg Creamery had not shipped such a large quantity of defective cheese to Falcone Dairy. This was not part of the indictment and, as a matter of fact, the indictment charges, in the conspiracy count, that from on or about "December 13, 1973, up to and including the date of this indictment", the defendants acted in violation of the statute.

There were completely improper insinuations made in the form of questions propounded by the prosecutor tending to suggest that defective cheese had not been received in 1971 in the quantities which the books and records of Falcone Dairy indicated.

We must bear in mind that the books and records of

Falcone Dairy were available to the Trustee in Bankruptcy and were never hidden. The entries were made in the regular course of business and showed the substantial credits given by Falcone Dairy to its customers.

The problem, as we have already stated, was that in 1974, following the disastrous fire which destroyed Alburg Creamery, and the involuntary petition in bankruptcy, on advice of counsel Falcone Dairy took the credit which they were entitled to in 1971.

There was never any proof that defective cheese was not returned to Falcone Dairy. J. Leo Laramee, the cheesemaker, merely testified that he did not recall that there had been any complaints or that any large quantities of defective cheese had been shipped by Alburg Creamery to Falcone Dairy. He did not dispute the fact that the credits were taken or that defective cheese did arrive in customers' hands from Falcone Dairy.

As was stated in UNITED STATES v. NILL, 518 F.2d 793, 800 (5 Cir. 1975),

> "Fraud connotes perjury, falsification, concealment, misrepresentation, Knauer v. United States, 328 U.S. 654 . . . 1946. It has been held that to establish fraud it is necessary to show a false representation of a material fact made with knowledge of its falsity with the intent to deceive. Pence v. United States, 316 U.S. 332 . . . 1942."

When Section 152 of Title 18 of the United States Code is viewed, it is obvious that there must be a concealment of assets or a false oath or claim with respect to such concealment. Nothing whatsoever is in the record of the case at bar. Even Mr. Axton, the F.B.I. agent who gave birth to this case, cannot

say that there was any failure of disclosure or that any record or book was false. At most, he could opine that he disagreed that the entry of the $210,000 credit in 1974 was proper bookkeeping procedure for 1971 credits which were due to Falcone Dairy from Alburg Creamery.

If there was a dispute about accountancy, the fact that full disclosure was made would preclude any criminal charge. In the case at bar nobody disputes that full disclosure has been made at all times. The suggestion that the cheese itself was not defective and that, therefore, the credits themselves should not have been given to the customers, is without any basis in the record whatsoever. The jury had no right to speculate as to whether or not in fact the Falcone Dairy should or should not have credited their customers with defective cheese in 1971. There is uncontradicted evidence that at the Falcone Dairy plant in 1971 in New York City, large quantities of defective cheese were returned from customers, and that this cheese had originated in Alburg Creamery. This evidence came not only from the defendants, but from bookkeepers and from a customer who testified. As a matter of fact, the Government was unquestionably aware of this since they interviewed the witnesses who the defense had called and also had interviewed many customers of the defendants.

The testimony of Professor Michaels at pages 567 through 570 revealed that it was his opinion that the entries made by Falcone Dairy were not only proper, but also fully disclosed everything to anybody who looked at the books. We must

bear in mind that these books were never hidden from anybody.

The cross-examination of Professor Michaels reveals that the Government was completely off-base in its prosecution. It asked, as it had asked otherwitnesses, whether or not Professor Michaels knew whether the cheese was in fact bad in 1971. We maintain that is irrelevant to this case. The issue is whether any assets were concealed in contemplation of a bankruptcy.

Whatever happened in 1971, was fully disclosed and was entered in the regular course of business in the books of Falcone Dairies.

As we have said time and again in this brief, nobody in their right mind could even suggest that what was done in 1971 was in contemplation of an involuntary bankruptcy which would occur in December of 1973 as a result of a non-incendiary fire in July of 1973.

The charge herein is a bankruptcy fraud of concealment of assets. There is absolutely no evidence that assets were concealed. In short, the entire case fails to reveal the commission of any crime whatsoever.

POINT II

THE DEFENDANTS-APPELLANTS RELIED UPON ADVICE GIVEN TO THEM BY AN ATTORNEY AT LAW HANDLING THE BANKRUPTCY MATTER IN VERMONT, AS WELL AS A CERTIFIED PUBLIC ACCOUNTANT OF SOME FORTY YEARS EXPERIENCE. IT WAS THEREFORE MANIFEST THAT THE DEFENDANTS COULD NOT HAVE HAD CRIMINAL INTENT. IN ANY EVENT, SINCE THERE WAS FULL AND COMPLETE DISCLOSURE TO THE TRUSTEE IN BANKRUPTCY AND ANYONE ELSE WHO WANTED TO VIEW THE BOOKS AND RECORDS, THERE WAS NO CRIME COMMITTED TO WHICH CRIMINAL INTENT COULD ATTACH.

The difficulty in dealing with this brief is that a

perusal of the record reveals that these defendants have been put through the gauntlet of a "prosecution" that does not exist. In otherwords, the entire prosecution herein is something that was concocted through a mistake of an F.B.I. accountant who, unfortunately, was not that well-versed in accounting procedures.

Even if his inference that a $210,000 credit should not have been taken in 1974 for credits given to Falcone's customers in 1971, the fact remains that the $210,000 credit was fully disclosed to the Trustee in Bankruptcy and was in no way hidden or concealed. The entries in 1971 were made in the regular course of business in the books of Falcone Dairies by regular bookkeepers and nothing was concealed with respect to those entries. There was nothing conjured up overnight, in other words, to create entries which had not existed before.

But that aside, it is obvious that the defendants acted upon advice of an attorney at law. Joseph Wool, an experienced attorney, testified, as did the defendants, that he informed them that they had a perfect right to take a credit for the amounts of cheese which were returned by customers in 1971, since they had not previously taken credits for that.

Mario Accardi, a certified public accountant who had represented Falcone Dairies for many years, testified that in his opinion the credit was proper even though it was somewhat unusual to wait two years before taking it.

The explanation that they could not take it in 1971 without putting Alburg Creamery out of business, was quite simple and obvious. Alburg Creamery was a wholly-owned subsidiary

of Falcone Dairies and the latter depended upon the former to stay in business since without production of cheese it could not service its customers. To have taken the credit at that time, that is 1971, would have been self-defeating since Alburg would no longer have a cash flow and would have been out of business. The entry itself in 1974, as a matter of fact, was for the purpose of showing the true picture and we submit that it might have been concealment not to have taken the $210,000 credit.

We hasten to add, that no creditor was in any way damaged by the $210,000 credit since it was merely a bookkeeping entry because Falcone Dairies was insolvent as well at that time. Falcone Dairies did not participate in the distribution of assets of Alburg Creamery and consequently the entry was merely to bring the picture into proper focus and not for the purpose of defrauding anyone.

It was, in fact, full disclosure, rather than non-disclosure. It obviously was not concealment.

Advice of counsel, while it may not be a complete defense to criminality, is nevertheless an important element to be considered in determining good faith of any person involved in a bankruptcy who is prosecuted for fraudulently concealing property from the trustee. In the case at bar there is no question that good faith advice was given by both Mario Accardi and Joseph Wool, Esq. (BISNO v. UNITED STATES, 299 F.2d 711 [C.A. Cal. 1961], cert. den. 370 U.S. 952; reh. den. 371 U.S. 855; HERSH v. UNITED STATES, Cir. Cal. 1934, 68 F.2d 799).

This factor of advice of an attorney and of a certified public accountant, coupled with the regular course of business entries in the books and records of Falcone Dairy should have impelled the District Court to grant the defense motion to dismiss this case.

The appellants, through their attorney, on a number of occasions, cited UNITED STATES v. TAYLOR, 2 Cir. 1972, 464 F.2d 240, to the District Judge, but to no avail. It is appropriate to quote the language of the Court of Appeals (id. at 242):

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence § 2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1894] L.R. 7 H.L. 213, 233:
>
> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

A perusal of the TAYLOR case reveals that if there

was ever a case where this doctrine should have been applied, this is the one. To have permitted lay jurors to grapple with the plethora of accounting jargon and books and records, was totally unfair.

We submit that what the jury conjured from this case was not a concealment of assets, but rather a question of vindicating the reputation of J. Leo Laramee, who had admitted that he resigned because he was unable to maintain proper standards as cheesemaker at Alburg Creamery. J. Leo Laramee was a Vermonter, whereas the defendants herein, both of Italian extraction, emanated from Brooklyn, New York.

POINT III

THE DEFENDANTS-APPELLANTS WERE DENIED A FAIR TRIAL BY VIRTUE OF THE FACT THAT F.B.I. AGENTS WERE PERMITTED TO TESTIFY AS TO CONVERSATIONS THEY HAD WITH THE APPELLANTS AT A TIME WHEN THE LATTER WERE NOT INFORMED THAT THERE WAS A CRIMINAL INVESTIGATION AFOOT. ADDITIONALLY, F.B.I. AGENT AXTON, AFTER AGREEING THAT HE WOULD NOT INTERVIEW DEFENDANT FALCONE, CONDUCTED A MEETING WITH FALCONE'S LAWYER AT WHICH FALCONE WAS PRESENT. THAT LAWYER, JOSEPH WOOL, ESQ., TURNED TO HIS CLIENT FROM TIME TO TIME TO OBTAIN CERTAIN INFORMATION. UNBEKNOWN TO MR. WOOL OR MR. FALCONE, AGENT AXTON DETERMINED THAT HE WOULD USE ANYTHING FALCONE SAID TO HIS OWN LAWYER AGAINST HIM. AT THE TRIAL AXTON WAS PERMITTED TO TESTIFY AS TO STATEMENTS HE HEARD FROM FALCONE DURING THIS INTERVIEW WITH FALCONE'S LAWYER. THIS WAS OUTRAGEOUS AND FUNDAMENTALLY UNFAIR CONDUCT.

During the trial, F.B.I. Agents James Kallstrom, Lawrence Playford, and Albert Axton testified as to conversations they had wherein they quoted statements made by the

defendants.

Both Kallstrom and Playford admitted that they had interviewed appellants in New York on occasions when they had not informed the appellants that this was a criminal investigation.

The testimony of Kallstrom and Playford was bad enough. We submit that it constituted improper prosecutorial conduct.

What bothers us most, however, is the actions of F.B.I. Agent Axton.

He testified that he arranged a meeting to discuss this bankruptcy matter with the bankruptcy attorney, Joseph Wool, of Burlington, Vermont. Mr. Wool represented the appellant Falcone, as well as Curreri.

At Mr. Axton's office, both Wool and Falcone arrived per schedule. Axton admits that Wool stated that he did not want his client interviewed.

Notwithstanding this fact, when the meeting commenced, from time to time Falcone had discussions with his own attorney which Axton could hear. Axton did not inform Wool that he would make mental notes of what Falcone was saying and would use these against him if necessary, at a later time.

At the trial, the Government did in fact introduce statements made by Falcone during this meeting, contrary to the understanding of his attorney.

We maintain that this was fundamentally unfair and the prosecutor should not have used it. (MESAROSH v. UNITED

STATES, 352 U.S. 1. 9, 14).

In 1 Cooley, Const. Lim. (8th Ed.) 646, Judge Cooley in this monumental work appropriately asserted:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . . . It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than impartial representatives of public justice." (Emphasis added.)

Mr. Justice Roberts in SORRELLS v. UNITED STATES, 287 U.S. 435 (1932), in an opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred, stated (id. at 453):

> "The efforts. . .to obtain arrests and convictions have too often been marked by reprehensible methods..."

Justice Roberts continued by referring to these methods as a "prostitution of the criminal law" (id. 287 U.S. at 457).

We must bear in mind that the conference with Mr. Wool was supposedly in a friendly, professional vein, and there was no idea whatsoever in the mind of Mr. Wool that Mr. Axton was acting as a "Trojan horse".

During the testimony (465-475), Axton admitted that Mr. Wool informed him that he did not want his client interviewed and also that Mr. Wool was completely unaware of the fact, as was Mr. Falcone, that the remarks Falcone was uttering to assist his lawyer in answering questions posed by Mr. Axton, would in

fact be used against Mr. Falcone at a later date.

In MESAROSH v. UNITED STATES, 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in McNABB v. UNITED STATES, 318 U.S. 332, the Supreme Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

In COOPEDGE v. UNITED STATES, 369 U.S. 438, the Supreme Court aptly proclaimed and cautioned (id. at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." (Emphasis ours.)

POINT IV

THE COURT ERRED IN ADMITTING DOCUMENTS WHICH APPELLANTS WERE REQUIRED TO FILE WITH THE BANKRUPTCY COURT, AND ALSO ERRED IN ALLOWING THE F.B.I. AGENTS, ESPECIALLY MR. AXTON, TO TESTIFY TO STATEMENTS MADE BY DEFENDANTS AT A TIME WHEN THEY WERE UNAWARE THAT WHAT THEY SAID WOULD BE USED AGAINST THEM IN A CRIMINAL PROSECUTION. THIS VIOLATED 11 U.S.C. §25(a)(10).

At the commencement of trial the Bankruptcy Referee (Judge Marro) appeared before the Court below and his testimony was taken by stipulation. He indicated that the defendants were supposed to appear and therefore the documents and other statements which found their way into the bankruptcy records were there pursuant to statute. (7-10) An objection was preserved and such cases as MARCHETTI v. UNITED STATES and GROSSO v. UNITED STATES, 390 U.S. 39, were cited to the Court on the grounds that the matters presented to the Bankruptcy Court are compulsory and not discretionary with people dealing with that Court. (9)

Substantial objections were made to the evidence of Agents Kallstrom, Playford, and Axton. (See Minutes of Hearing on Motions to Suppress, dated February 4, 1976, and the testimony of the aforesaid individuals which has been adverted to in this brief.)

See UNITED STATES v. GOODWIN, 470 F.2d 893, 903 (5 Cir. 1972); see also, UNITED STATES v. BLUE, 384 U.S. 251.

We therefore maintain that it was fundamentally unfair to have permitted this evidence to be introduced against

the appellants herein. See COPPEDGE v. UNITED STATES, supra; MESAROSH v. UNITED STATES, supra; and McNABB v. UNITED STATES, supra.

In essence, these agents were beguiling the defendants and, in fact, Agent Axton misrepresented in essence, to the attorney Joseph Wool, concerning whether or not the statements of Mr. Falcone would be used. This smacks of the same kind of deception that was condemned in SPANO v. NEW YORK, 360 U.S. 315.

POINT V

THE APPELLEES WERE IN ESSENCE GRANTED TWO SEPARATE SUMMATIONS SINCE ASSISTANT UNITED STATES ATTORNEY O'NEILL SUMMED UP FOR THE PROSECUTION AND FOLLOWING THE DEFENSE SUMMATION, UNITED STATES ATTORNEY COOK GAVE WHAT AMOUNTED TO ANOTHER FULL SUMMATION. THERE WERE REMARKS MADE IN SUMMATION WHICH WERE PREJUDICIAL, ESPECIALLY ON THE PART OF MR. COOK WHO INDICATED HIS OWN PERSONAL FEELINGS ABOUT THE EVIDENCE AND THE RESULT THE JURY SHOULD REACH.

The Court itself, after motions were made by the defense, stated that it felt that this case presented a "close question". (535)

Mr. O'Neill made improper remarks concerning the fact that this case had nothing to do with attorneys or C.P.A.'s. Of course, since advice of these professionals would be a defense if believed by the jury, that was obviously improper. (894)

Again, Mr. O'Neill adverted to the fact that attorney Wool's lips were sealed by the attorney-client privilege. (896) This, too, was prejudicial, since when attorney Wool took the

stand, the attorney-client privilege was obviously waived.

There were also improper remarks as to the fact that the defense had not called certain witnesses. (906)

In addition, the prosecutor declared that one Ferro, who was not even called as a witness, was a close associate of the defendant. (906) There was no basis for this since it never appeared in evidence. The prosecutor further declared that inferences could be used as evidence and when an objection was interposed that circumstantial evidence could be used but not merely inferences, the Court did not even admonish the jury. (909)

Moreover, there was a comment by the prosecutor that Falcone had not produced warehousemen to substantiate the bad cheese. First of all, this was an improper remark. (914) Additionally, there was no burden upon the defendant to prove or disprove anything. Moreover, evidence had been introduced from the defendant, Curreri, two bookkeepers, a customer, Compagna, all of whom testified as to the rancid and odoriferous condition of the cheese in 1971. (914)

The Court would not instruct the jury to disregard the remarks. (915, 916)

Since even the Court realized that this was a close case, it was extremely important that the counsel be completely fair in presentation of a summation. Yet time and again the United States Attorney himself, who allegedly presented the rebuttal, but who in effect summed up a second time, constantly used the first person "we think" and phrases such as that. For

example, on page 965 the United States Attorney said, inter alia:

> "...we think under the circumstances, that they just cannot be believed."

The United States Attorney brought up matters not even mentioned by the defense in its summation. (975, wherein the U.S. Attorney referred to Mr. Sheltra, whom defense counsel had not even mentioned.)

At 976, the United States Attorney stated what he personally believed, saying ". . . I believe, Mr. Falivene who said he was close with the defendants. . ."

At 981, the United States Attorney, without any basis whatsoever in the record, inferred prejudicial inferences against the appellants, indicating that they had acted wholly improperly, without any evidence whatsoever of that fact. Even the Court was constrained to say that he was unaware of any evidence with respect to this matter. The United States Attorney, however, stood upon his argument and the prejudice was not in any way alleviated.

It is elementary that it is improper of counsel to give his own opinion as to the issues which a jury must resolve. (LAWN v. UNITED STATES, 355 U.S. 339, reh. den. 355 U.S. 967: 50 A.L.R.2d 766; 81 A.L.R.2d 1240).

POINT VI

THE DEFENSE HAD MOVED TO DISMISS THE INDICTMENT ON THE GROUNDS THAT NO CRIME WAS ESTABLISHED. MOREOVER, THE INDICTMENT ITSELF WAS TOO VAGUE TO ADEQUATELY APPRISE THE DEFENDANTS OF THE CHARGES AGAINST THEM. FINALLY, THE PROSECUTION WAS PERMITTED TO INTRODUCE EVIDENCE OUTSIDE THE SCOPE OF THE CONSPIRACY WHICH BEGAN ALLEGEDLY IN DECEMBER OF 1973, BUT THE PROOF CONCERNED ALMOST EXCLUSIVELY THE YEAR 1971.

Under this indictment, which is framed under 18 U.S.C. §152, it is essential that the Government prove that the defendants acted in contemplation of a bankruptcy. The indictment begins the conspiratorial action on or about December 13, 1973, up to and including the date of the indictment. Yet a substantial portion of the evidence introduced referred to the year 1971, which was well before any possible bankruptcy could have been contemplated by anybody. The bankruptcy, as we have already said, was precipitated by a non-incendiary fire which destroyed the Alburg Creamery in July of 1973. It is inconceivable, therefore, that the acts alleged in 1971 could have been in contemplation of that involuntary bankruptcy.

Defense counsel had moved to dismiss the indictment on the grounds that it was too vague and did not adequately apprise the defendants of the charges against them. Certainly, nothing was said about bad cheese in 1971 in this entire indictment. The grand jury, presumably, was not told about it either. The bill of particulars which was supplied by the Government did not specify that the theory of the prosecution was bad cheese in 1971, which the prosecution urged was not really

that bad.

It is elementary that an indictment standing alone must contain at least the following elements:

> "The indictment standing alone must contain the following elements to constitute the offense charged:
>
> (a) Time and place must be alleged.
>
> (b) Knowingly and fraudulently must be alleged.
>
> (c) A description of the property concealed must be alleged.
>
> (d) The names or identification of the parties from whom conealed must be alleged.
>
> (e) That the property was part of the bankrupt estate must be alleged."
>
> (2 Collier on Bankruptcy ¶29.05, p. 1175, 1176-1179 [14th ed. 1969].)

See UNITED STATES v. ARGE, 10 Cir. 1969, 418 F.2d 721, 724. See also, CLAY v. UNITED STATES, 326 F.2d 196, 198 (10 Cir. 1963).

It is obvious that the prosecution shifted theories during the trial. When it realized that everything had in fact been disclosed, including the $210,000 entry which they were so concerned about, the prosecution sought to dwell upon a 1971 series of transactions wherein credits were given by Falcone Dairies to its own customers for defective cheese. This was no part of the indictment and was not within the purview of the conspiracy. Yet the Court permitted substantial evidence along this line and the jury unquestionably found not that there had been any failure to disclose or concealment, but rather that there was some question as to whether or not the cheese was good or bad in 1971 and whether the reputation of the cheesemaker,

Mr. Laramee, was to be vindicated.

The Supreme Court of the United States, when addressing itself to the issue of shifting theories and changing the thrust of an indictment from that which the grand jury found, has held throughout the years that an indictment must allege all of the essential elements of a crime in order to be sufficient. (UNITED STATES v. DEBROW, 346 U.S. 374, 376; MORISETTE v. UNITED STATES, 342 U.S. 246 at 270; EX PARTE BAIN, 121 U.S. 1, 10; STIRONE v. UNITED STATES, 361 U.S. 212; and, UNITED STATES v. DENMON, 483 F.2d 1093 [8 Cir. 1973]. There are a host of other cases as well which are pertinent.)

We must bear in mind that a bill of particulars cannot be used for the purpose of amending an indictment. (RUSSELL v. UNITED STATES, 369 U.S. 749.) The bill of particulars did not advise appellants of the fact that the case would go to the jury on the contention of undisclosed underwriters.

In GAITHER v. UNITED STATES, 413 F.2d 1061 (D.C. Cir, 1969), the Court explained id. at 1067:

> "The Supreme Court has continued to adhere to the Bain principle in recent years. In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960), the grand jury charged a violation of the Hobbs Act. It found that the interstate commerce affected was the victim's shipment of sand from various other states to his plant in Pennsylvania. The trial judge allowed the Government to introduce evidence of interstate commerce other than that charged -- i.e., the movement of finished steel from the victim's plant outward to other states. The Court set aside the conviction, holding that the proof at trial of these uncharged facts amounted to an amendment of the indictment with respect to the element of interstate commerce. The Court relied on Bain, and quoted extensively from the passage set out above.
>
> "In Russell v. United States, 369 U.S. 749, 82

S.Ct. 1038 (1962), the Supreme Court held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars fully serves the functions of apprising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a grand jury. The Court again cited the passage from Bain, referred to 'the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form', and stated:

'... To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.' ..."

In UNITED STATES v. DENMON, supra, the Court noted that the failure of an indictment to charge any essential element of the crime as submitted to the petit jury was fatally defective.

Thus, at 483 F.2d at pages 1095, 1096, the Court explained:

"The Supreme Court when addressing itself to this issue has throughout the years held that an indictment must allege all of the essential elements of a crime in order to be sufficient. United States v. Debrow, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953); Morisette v. United States, supra at 270, 72 S.Ct. at 253, n.30; Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1932); United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). The Government here, however, would remedy the defect of not alleging criminal intent or mens rea by applying the following 'fairness test' enunciated by Professor Wright:

"The fundamental purpose of the pleadings is to inform the defendant of the charge so that he may prepare for his defense, and the test of sufficiency ought to be whether it is fair to the defendant to require him to defend on the basis of the charge as

> stated in the particular indictment or information. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested. C. Wright, Federal Practice and Procedure, §125, at 233-34 (1969) (footnotes omitted).
>
> "In applying the 'fairness test,' the Government points out that the District Court properly instructed the jury on specific intent and defined 'knowingly,' 'unlawfully' and 'wilfully.' So it did and it is probable that the defendant was not mislead as to the crime charged, but we think the omission of an admittedly essential element of the offense in the indictment is a matter of substance and not form. Nor can the missing element here be properly implied or inferred from other elements and allegations of the indictment.
>
> "We heartily applaud the salutory trend in recent years to simplify the indictment as embraced in Fed.R. Crim.P. 7(c) that only requires that '[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charge.' Yet we cannot go so far in economy of words as to approve the omission in an indictment of essential elements of an offense."

Due process of law, the Supreme Court has observed, "requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept .... What is fair in one set of circumstances may be an act of tyranny in others." (SNYDER v. MASSACHUSETTS, 291 U.S. 97, 116, 117.)

Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (LISENBA v. CALIFORNIA, 314 U.S. 219, 236.)

Basic to the very idea of free government and among the immutable principles of justice which no prosecutorial authority may deny or disregard is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it." (POWELL v. ALABAMA, 287 U.S. 45, 68.)

Thus, where a trial proceeds on one theory, and the Court and prosecutor suddenly send the case to the jury on a theory that was not charged in the indictment and was not the subject of the evidence at the trial proper, the conviction is as much a violation of due process as a conviction upon a charge never made. (COLE v. ARKANSAS, 333 U.S. 196, 202, and WILLIAMS v. NORTH CAROLINA, 317 U.S. 287, 292.)

In WILLIAMS, supra, the Supreme Court explained that where a jury verdict of guilty is based upon a general verdict that does not specify on which ground it rests, and one of the grounds upon which it may rest is invalid, the judgment cannot be sustained.

Similarly, a conviction based upon a dearth of evidence (e.g., undisclosed underwriters) cannot stand. (THOMPSON v. LOUISVILLE, 362 U.S. 199; and GARNER v. LOUISIANA, 368 U.S. 157.)

A person can be tried only upon the indictment as found by the grand jury, and especially upon the language found in the charging part of the instrument. (STIRONE v. UNITED STATES, 361 U.S. 212, supra, wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon the charges presented in the indictment.)

A change in the indictment which is not made by the grand jury deprives the Court of the power to try the accused. (EX PARTE BAIN, 121 U.S. 1, 12.)

See, also, UNITED STATES v. CURTIS, (10 Cir. 12/4/74), 506 F.2d 985, 16 CrL 2285, holding that an indictment not specifying the charge submitted, is insufficient to uphold a conviction,

despite sufficiency of evidence.

> "For all the indictment shows the grand jury may have had a concept of the scheme essentially different from that relied upon by the government ... Instructions cannot save a bad indictment ..." (UNITED STATES v. CURTIS, supra, id. at 16 CrL 2286, 506 F.2d at 992.)

CONCLUSION

The judgment of conviction as to each appellant should be reversed and the indictment dismissed. In the alternative, a new trial should be ordered.

Respectfully submitted,

IRVING ANOLIK and
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Attorneys for Defendants-Appellants.

IRVING ANOLIK,
Of Counsel.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, NY.

That on the 19 day of AUGUST, 1976, deponent personally served the within DEFENDANTS-APPELLANTS JOINT BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

HON. GEORGE W. F. COOK
UNITED STATES ATTORNEY
ATTORNEY FOR APPELLEE
UNITED STATES COURTHOUSE
RUTLAND, VERMONT

Robert La Grassa

Sworn to before me this
19th day of August, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0[illegible]
Qualified in Bronx County
Commission Expires March 30, 1977